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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

(HONORABLE LARRY A. BURNS)

UNITED STATES OF AMERICA,	)	CASE NO. 07CR3161-LAB
	)	
Plaintiff,	)	DATE: June 9, 2008
	)	TIME: 2:00 p.m.
v.	)	
	)	NOTICE OF MOTION AND MOTION OPPOSING ADMISSION IN EVIDENCE OF FOREIGN RECORD OF REGULARLY CONDUCTED ACTIVITY
GENARO SMITH-BALTIHER,	)	
	)	
Defendant.	)	

TO: KAREN P. HEWITT, UNITED STATES ATTORNEY, AND PAUL L. STARITA, ASSISTANT UNITED STATES ATTORNEY:

PLEASE TAKE NOTICE that on June 9, 2008, at 2:00 p.m. or as soon thereafter as counsel may be heard, the defendant, Genaro Smith-Baltiher, by and through his counsel, Joseph M. McMullen and Federal Defenders of San Diego, Inc., moves this Court for an order precluding the admission of foreign documents offered by the Government.

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I.

STATEMENT OF FACTS

Last year, on December 3, 2007, Genaro Smith-Baltiher was arraigned on a one-count indictment charging him with illegal re-entry after deportation in violation of 8 U.S.C. § 1326. Trial is set for June 10, 2008. This afternoon, on June 4, 2008, defense counsel met with government counsel to discuss any remaining evidentiary issues regarding the trial next week. At that meeting, government counsel provided defense counsel with an exhibit list describing the government's proposed exhibit number five as the "Mexican Birth Certificate of Genaro Smith-Baltiher." At no time prior to June 4, 2008 has government counsel expressed its intention to offer such foreign document into evidence. Defense counsel has never received written notice of the government's intention to offer such foreign document into evidence.

The foreign document that the government intends to introduce is accompanied by a document that purports to be a "Certificate of Authenticity of Foreign Business Records." This document consists of a declaration by an employee of the United States Immigration and Naturalization Service regarding the authenticity of the documents.

II.

THE GOVERNMENT SHOULD NOT BE ALLOWED TO OFFER THE FOREIGN DOCUMENT AT TRIAL

Under 18 U.S.C. § 3505, a foreign record of regularly conducted activity must be accompanied by a foreign certification in order to be admissible in a federal criminal trial. 18 U.S.C. § 3505(a).

> "Foreign certification" means a written declaration *made and signed in a foreign country* by the custodian of a foreign record of regularly conducted activity or another qualified person that, if falsely made, *would subject the maker to criminal penalty under the laws of that country*.

18 U.S.C. § 3505(c)(2) (emphasis added).

"At the *arraignment or as soon after the arraignment as practicable*, a party intending to offer in evidence under this section a foreign record of regularly conducted activity shall provide written notice of that intention to each party." 18 U.S.C. § 3504(b) (emphasis added).

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On June 4, 2008, the government provided defense counsel with an exhibit list for trial. The fifth item on the list is described as "Mexican Birth Certificate of Genaro Smith-Baltiher." The exhibit referenced by the government contains an attached declaration by an employee of the United States Immigration Service attesting to the authenticity of the foreign document. The declaration inexplicably suggests that the U.S. I.N.S. employee makes such declaration "with the understanding that [he is] subject to criminal penalty under the laws of __Mexico__, for any, intentionally false statements herein." The declaration does not indicate that it was "made and signed in a foreign country," as required under 18 U.S.C. § 3505(c)(2), nor does it offer any explanation for why such a declaration by an employee of the U.S. I.N.S. "would subject the maker to criminal penalty under the laws of Mexico." 18 U.S.C. § 3502(c)(2).

This Court should not allow such exhibit into evidence because (1) the exhibit list is insufficient written notice and no other type of written notice has been provided; (2) the insufficient written notice is also untimely; (3) the exhibit is not accompanied by a valid foreign certification, as defined under 18 U.S.C. § 3502(c)(2); and (4) the authenticity of the document is in question based on other similar documents in the A-files of Mr. Smith-Baltiher and his mother that contain contrary information.

III.

CONCLUSION

For the foregoing reasons, Mr. Smith-Baltiher objects to the admission of the foreign document offered by the government and requests that this Court order that it not be admitted.

Respectfully submitted,

Dated: June 4, 2008

/s/ Joseph M. McMullen

JOSEPH M. McMULLEN
Federal Defenders of San Diego, Inc.
Attorneys for Mr. Smith
Joseph_McMullen@fd.org

CERTIFICATE OF SERVICE

Counsel for Defendant certifies that the foregoing is true and accurate to the best information and belief, and that a copy of the foregoing document has been caused to be delivered this day upon:

Courtesy Copy to Chambers

Copy to Assistant U.S. Attorney via ECF NEF

Copy to Defendant

Dated: June 4, 2008

/s/ Joseph M. McMullen

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